MOTION FILED JAN 31 1963

In The

Supreme Court of the United States

October Term, 1962

No. **705**

FIRST CONGREGATIONAL CHURCH AND SOCIETY OF BURLINGTON, IOWA, *et al.*,
Petitioners,

against

EVANGELICAL AND REFORMED CHURCH, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The undersigned, a member of the bar of this Court, as counsel for the plaintiffs in the case referred to in paragraph 3 hereof, respectfully moves this Court for leave to file a brief, annexed hereto, as *amicus curiae* in the above captioned case because there are facts and questions of law which the undersigned believes will not adequately be presented to the Court for consideration, but which are important and relevant to the disposition of this case.

Service of copies of this Motion and Brief have been made on all counsel of record herein as required by Rule 27 of this Court.

The facts and questions of law referred to above are not matters of record in the case before the Court, but arise out of the proceedings in a certain action, now pending on appeal in the Court of Appeals of Lucas County, Ohio, entitled "Keith Wilson, et al, vs. Washington Congregational Church," being cause No. 5654 on the Docket of said Court. The undersigned is counsel for the plaintiffs-appellants in said action.

The broad implications and claims being made as to what was decided by the Courts below in the captioned action, now before this Court, clearly appear from the Ohio case wherein it has been argued, and the trial court has held, that the decision in the Second Circuit Court of Appeals below is *res judicata* as to every question, ecclesiastical or otherwise, any local Congregational church anywhere in the United States can raise in connection with a vote of such a church to join The United Church of Christ, including the issue of whether such "United Church" represents a fundamental departure from the policy and principles of Congregationalism and of such churches. That any such broad claim could or would be made, and successfully argued, does not appear in the record now before this Court.

Said Ohio action was commenced in the Common Pleas Court of Lucas County, Ohio, to vacate and set aside a purported vote of said Washington Congregational Church to approve the constitution of The United Church of Christ and to become a local church of that new denomination. The issues are shown by the pleadings in that case, to-wit:

(a) The Petition alleges that Washington Congregational Church is an Ohio non-profit corporation,

wholly autonomous, not subject to any outside ecclesiastical body, but in fellowship with the General Council of Congregational Christian Churches for the sole purpose of carrying out their common aims; that the faith, creed and polity of said church are expressly provided in the written constitution; that the vote was not taken in accordance with said constitution; and that such a vote constitutes a radical departure from the Congregational polity and principles of said Washington Congregational Church, depriving plaintiffs of their civil and property rights in violation of the Federal and Ohio Constitutions.

(b) The Answer alleges that the decision of the New York Court of Appeals in *Cadman, etc. v. Keegan*, etc., 306 N. Y. 151, 116 NE (2) 481, (the "*Cadman*" case), and the decision of the Second Circuit Court of Appeals below, 305 Fed. (2) 724, in the above entitled action (referred to in the Ohio action as the "Mayfair" case) are *res judicata* and an *estoppel by judgment* of each and every issue raised by the Petition, including the procedural questions, in the Ohio case. These affirmative allegations were denied in plaintiffs' reply.

(c) A Motion for Summary Judgment was filed by the defendant, and in support thereof Loren T. Wood, Esq. (one of the attorneys for the respondents in the captioned case in this Court) stated in an affidavit:

> "All of the issues raised in plaintiffs' Petition have been adjudicated adversely to the plaintiffs' position in the Cadman and Mayfair cases."

(d) In granting said Motion for Summary Judgment the trial judge stated in the journal entry:

> "II. Plaintiffs in the Mayfair case represented a class of which plaintiffs in the present action were members and claimed and sought declarations of rights and interests in the subject matter of the litigation which included all the rights and interests asserted by plaintiffs herein, (except plaintiffs' objections to the voting procedure employed). Plaintiffs herein are estopped by said judgment from litigating the issues presented herein (except plaintiffs' objection to the voting procedure employed) and said case is res judicata as to such issues."

Thus, on the basis of the foregoing affidavit of counsel herein for the respondents the trial judge in the Ohio case held that the decision below by the United States Court of Appeals, (known as the *Mayfair* case), affirming Judge Dimock's decision, 198 Fed. Supp. 677, determined said issue of departure and other issues raised by the pleadings in the Ohio case and was applicable as *res judicata* to those issues. This summary judgment was granted on September 4, 1962. The opinion of the Second Circuit Court of Appeals below was filed August 1, 1962, and was presented to the trial judge in the Ohio case for consideration before he entered judgment.

As shown above, it has been, and is now being, argued that even though each local Congregational church is a separate legal entity, wholly autonomous, and even though each defines its own faith and polity in its own written constitution, that the *Cadman* case and Judge Dimock's decision, 198 Fed. Supp. 677, as affirmed by the Second Circuit Court of Appeals below on August 1, 1962, finally and conclusively decided every question, ecclesiastical or otherwise, that could be raised by any Congregational church in the

United States under its own written constitution, even though the members of such Congregational church had never heard of the *Cadman* case and had no opportunity to participate therein.

Although the contention has been successfully argued in the trial court in Ohio in the Washington Congregational Church case, it is obvious from a study of the record in the *Cadman* case that the New York Courts never intended their judgment to have any such broad application, and that the lower Federal Courts in the captioned case have misconstrued and misapplied the *Cadman* decision in rendering their decision.

WHEREFORE, the undersigned moves the Court for an order authorizing him to file the annexed brief herein as *amicus curiae* setting forth facts relative to said Ohio litigation, with relevant law, bearing upon the question as to whether this Honorable Court should grant the Petition for a Writ of Certiorari heretofore filed herein.

Respectfully submitted,

R. B. Swartzbaugh
1304 Toledo Trust Building
Toledo 4, Ohio

In The

Supreme Court of the United States

October Term, 1962

FIRST CONGREGATIONAL CHURCH AND SOCIETY OF BURLINGTON, IOWA, *et al.*,

against

EVANGELICAL AND REFORMED CHURCH, *et al*

BRIEF AMICUS CURIAE AND BRIEF IN SUPPORT OF MOTION FOR A WRIT OF CERTIORARI

For brevity, the above captioned case will sometimes be referred to below as the "Mayfair" case, the case of *Cadman, etc. v. Kenyon*[1] as the "Cadman" case, and the case of *Wilson, et al. v. Washington Congregational Church*[2] as the "Ohio" case.

As shown in the foregoing Motion, the trial court in the *Ohio* case, on a Motion for Summary Judgment, held that the issue of *departure* raised by the Petition (par. 12) in the *Ohio* case had been determined in *Mayfair* and that *Mayfair* was res judicata on this issue.

According to the Ohio court, the plaintiffs in *Mayfair* represented a class of which plaintiffs in the *Ohio* case were members and "claimed and sought *declarations of rights* and *interests* in the *subject matter* of the litigation which

Fn. 1 195 Misc. 124, 95 N.Y.S. 2d 133, rev'd, 279 App. Div. 1015, 1074 111 N.Y.S. 2d 808, aff'd, 306 N.Y. 151, 116 N.E. (2) 481 (1953).

Fn. 2 C.A. 5654, Lucas County, Ohio, pending.

included all the rights and interests" asserted by the plaintiffs in the *Ohio* action who, therefore, are estopped by the *Mayfair* judgment from relitigating these issues.

I. Mayfair Case is of Great General and Public Interest.

We believe that the trial court in the *Ohio* case misconstrued the *Cadman* and *Mayfair* decisions, and that both the District Court and the Circuit Court of Appeals in *Mayfair* misconstrued and misapplied the decision in *Cadman*.

However that may be, the decision in the *Ohio* case is one of first impresssion in Ohio and will be used as a precedent unless and until reversed, or until the *Mayfair* case has been clarified. Denial of the Petition for a Writ of Certiorari will be claimed to be an affirmance of the language in the opinion of Judge Dimock incorporated into the judgment entry in the District Court, and to confirm the viewpoint of the proponents of the merger as to what *Cadman* decided.

There are approximately 350 Congregational Christian Churches in Ohio with more than 90,000 members as shown by the 1962 Yearbook. Some of these churches have written constitutions and some do not. Some of these constitutions expressly define the polity and faith of the particular church and some do not. In any event, the provisions of these constitutions are by no means identical.

Nevertheless, in every instance where a vote on the merger has been proposed or taken the members of the con-

gregation have been told that *Mayfair* and *Cadman* decided every legal issue which could possibly be raised in any local congregational church and would prevent the litigation or re-litigation of any such issue by anyone who didn't approve of the merger. On the basis of these representations dissenting members have been urged to forget their convictions and to accept the determination of *Mayfair* and *Cadman* as final.

Furthermore, in every instance of a vote on the merger there has been a substantial minority which sincerely believes and is convinced that the congregational heritage is worth saving and will be lost to their church if it becomes a local church of a new denomination under an overall national constitution, the implications of which are difficult, if not impossible, to ascertain. Never previously had local congregational churches ever been subject to any such national constitution.

In any event, if these contentions are permitted to go unchallenged and this Court denies the Petition for a Writ of Certiorari in the *Mayfair* case, the minority groups of these churches in Ohio will be deprived of their rights as a faithful minority under Ohio law if their church is one which votes to become a local church of this new denomination. We do not believe that the courts in *Mayfair* and *Cadman* ever intended their decisions to have any such effect or application.

II. Application of Mayfair as Res Judicata Deprives Members of Ohio Churches of their Rights as a Faithful Minority.

Under Ohio law a departure from traditional polity, faith or creed by a church gives rise to the rights of a

"faithful minority" and entitles the minority to the continued use of the church property. *Methodist Church v. Wood*, 5 Ohio 283; *Wiswell v. First Congregational Church*, 14 O.S. 31, 44; *Bakos v. Takach*, 14 Ohio App. 370; *Kemp v. Lentz*, 46 O. Abs. 28.

Thus, in *Wiswell v. First Congregational Church*, 14 O.S. 31, 44, supra, the Supreme Court of Ohio stated:

> "Where dissensions have arisen, and schism follows, although it be decided, judicially, that there is no intelligible difference in doctrine or opinion, *those who adhere to the old organization are entitled to its property in exclusion of all others.*" (Emphasis added.)

And in *Bakos v. Takach*, 14 Ohio App. 370, supra, the court held:

> ". . . A court of equity will enjoin the majority of the members of such religious organization from changing the organization so as to effect an avowed change of denominational relations, which would *amount* to a turning over of the property to another separate, distinct denomination. . . ." (Emphasis added.)

The effect of applying *Mayfair* as res judicata or as collateral estoppel to any Ohio church case is to deprive the minority members of that church, if there is a favorable vote for the merger, of any local determination either as to the facts in its own case or the Ohio law applicable thereto, and this is what the proponents of the merger intend. Thus, all litigation could be terminated at the local level on the basis of the *Mayfair* case even though each church involved is a separate legal entity and wholly autonomous, and even

though the minority members of this church never heard about *Mayfair* or *Cadman* previously nor had any opportunity to appear or participate in those cases.

Any careful study of the *Mayfair* and *Cadman* cases shows that it was never intended that those decisions should be given full faith and credit by courts in other states in determining the local rights of faithful minorities. But because of the unique and singular pre-trial practice pursued by Judge Dimock in the District Court, and the affirmance of that judgment by the Circuit Court of Appeals, *Mayfair* is being currently so applied in Ohio, and this application is being urged upon the courts in Michigan and presumably elsewhere.

III. Res Judicata is Based on Judge Dimock's Opinion as Affirmed by the Circuit Court of Appeals in Mayfair.

In the District Court in the *Mayfair* case Judge Dimock adopted his opinion, dated March 31, 1961, into the judgment entry as constituting facts and conclusions of law.[1] In his opinion the District Judge used the following language:

> "The opinion *(Cadman)* went on to say, in substance, that the plan envisaged by the Basis of Union with Interpretations, if accepted by a given Congregational Christian Church, would not constitute an interference in or abridgment of congregational usage or practice. On that basis the judgment dismissing on the merits the suit for declaration was affirmed. . . ."

Fn. 1. Appendix to Plaintiffs-Appellants Brief in Mayfair, Vol. I, p. 10a.

> "I find nothing in the Constitution and By-laws of the United Church of Christ which goes any farther than the Basis of Union with Interpretations in depriving any member of the classes represented by plaintiffs on this action of any rights."

Judge Dimock clearly misconstrued and misinterpreted the decision in *Cadman*, but the Circuit Court of Appeals in *Mayfair* has affirmed the judgment entered in the District Court by Judge Dimock although pointing out in its opinion that no ecclesiastical question was decided in the *Cadman* case. Similar statements were also made by the New York Court of Appeals in the *Cadman* case, as well as in the opinion of the Appellate Division in that case. Nevertheless, the reasoning of the Ohio court appears to be that since the Circuit Court of Appeals in *Mayfair* affirmed Judge Dimock's judgment that it is this judgment which constitutes the decision in *Mayfair* rather than the language of the Circuit Court of Appeals in its opinion handed down on August 1, 1962. See: *Harriman v. Northern Securities Corp.*, 197 U.S. 244, 49 L. Ed. 739.

This also raises the propriety of the pre-trial practice ordered by Judge Dimock. The plaintiffs were denied the right to produce any witnesses or documentary or other evidence. On the basis of statements of legal counsel, taking approximately twelve trial days, Judge Dimock entered judgment purporting to accept statements of plaintiffs' counsel, which he in fact did not accept. We believe that the action of Judge Dimock constitutes an abuse of discretion and should neither be encouraged, authorized or approved as proper pre-trial practice. In a similar case involving summary judgment this Court stated in *Kennedy v. Silas Mason*, 334 U.S. 249, 256-257, 92 L. Ed. 1347:

> "While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide."

For all of the reasons suggested above, we believe that this Court should grant the Petition for a Writ of Certiorari and that the judgment of the Circuit Court of Appeals affirming the District Court should be reversed.

Respectfully submitted,

SWARTZBAUGH, MOOR & LONGTHORNE

R. B. SWARTZBUAUGH, *Of Counsel*

APPENDIX

In The

COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 190424

KEITH WILSON, *et al.*,

Plaintiffs,

vs

THE WASHINGTON CONGREGATIONAL CHURCH OF TOLEDO, LUCAS COUNTY, OHIO

Defendant.

PETITION

1. Plaintiffs are members in good standing of the defendant, Washington Congregational Church.

2. Defendant is a non-profit corporation organized and existing under and by virtue of the laws of the State of Ohio and a member of the Congregational Christian Fellowship with its church building and place of worship in the City of Toledo, Ohio.

3. The General Synod of the United Church of Christ is an ecclesiastical body formed in 1957 for the purpose of merging the Evangelical and Reformed Church and the Congregational Christian Churches of the United States

into the United Church of Christ under a Constitution approved by the General Synod of said United Church of Christ on July 6-8, 1960.

4. Under said Constitution a local church of the Congregational Christian fellowship becomes a local church of the United Church of Christ by approving said Constitution and/or voting to become a part of it. The United Church of Christ is composed of local churches, associations, conferences and the General Synod. Said Associations, Conferences, and General Synod are ecclesiastical bodies. By becoming a part of said United Church of Christ a local church thereof is amenable to said ecclesiastical bodies under said Constitution which expressly provides that actions by, or decisions or advice emanating from, the General Synod, a Conference or an Association, should be held in the highest regard by every local church.

5. Congregational Christian Churches have a heritage and tradition going back more than four hundred years. There are currently approximately six thousand Congregational Christian churches in the United States. Under the congregational system heretofore followed by said churches, each church owns its property, and so far as church government is concerned is autonomous and owes no fealty or obligation to any higher ecclesiastical authority. There is no overall constitution for churches of said fellowship, written or otherwise.

6. In conformity with the said tradition of the Congregational Christian Churches and pursuant to the statutes of Ohio defendant adopted a Constitution and By-laws for the conduct of the business of the church which, at all times mentioned herein, was in full force and effect. Said Consti-

tution and By-laws contained the following provisions, to wit:

a) ARTICLE II **Government and Fellowship**

The government of this church is vested in its members, who exercise the right of control in all its affairs. It is amenable to no other ecclesiastical body, but it accepts the obligations of mutual counsel, comity and co-operation involved in the free fellowship of the Congregational Churches, and pledges itself to share their common aims and work. This church is in direct fellowship with the Toledo Association, the Congregational Conference of Ohio, and the National Council of Congregational Churches of the United States; and with all churches which seek to promote the Kingdom of our Lord, Jesus Christ.

b) ARTICLE XI **Amendments**

This Constitution may be amended by a two-thirds vote of the members present at any Annual Meeting of the Church or at a meeting specially called for that purpose, proposed amendment being inserted in the call. But no change shall be made in Article II except at an Annual Meeting and by a three-fourths vote of the members of the Church present and voting, said proposed change having been laid before the Church in writing at a business meeting not less than one month before the time of the proposed action and read from the pulpit on the Lord's Day next succeeding the proposal.

c) ARTICLE VIII **Meetings**

Public services shall be held each week on the Lord's Day. The Lord's Supper shall be observed

at such season as the Pastor and the Board of Deacons shall determine. The annual meeting of the Church shall be held on the Friday following the second Sunday in January, to hear the yearly reports of the officers, organizations and boards, to elect officers, to transact business and to adopt plans for the new year. Special meetings of the Church may be called by the Minister or the Moderator at the request of the Church Council or any of the boards, or on the written request of five adult members, specifying the objects thereof. Such notice shall be read at the public service on the Lord's Day next preceding the day fixed for such meeting. No special meeting shall be held on the same day on which the notice is given.

A quorum at any meeting of the Church shall consist of 50 voting members. A majority vote of the members shall ordinarily be decisive. The calling of a minister, to be done usually upon the recommendation of not less than two-thirds of the Church Council, shall require a two-thirds vote of all voting members of the Church present at a meeting especially called for this purpose.

7. By letter dated May 8, 1961, the defendant church, announced that a majority of the members of the defendant church voting had voted "yes" on ballots on which the following appeared, to-wit:

"I approve the constitution of the United Church of Christ and thus favor Washington Congregational Church being part of it."

8. Plaintiffs say that any such purported and pretended vote was not taken in accordance with the express, mandatory provisions of the Constitution and By-laws of de-

fendant church and is invalid, without legal force or effect, and should be vacated, set aside, held for naught, and expunged from the church records for the following reasons, to-wit:

a) Article II of the Constitution and By-laws of the defendant church provides that it is "amenable to no other ecclesiastical body". A vote to approve the constitution of the United Church of Christ and to make the defendant church "a part of it" is a vote to amend Article II of the Constitution and By-laws of defendant church. Such a vote can only be taken at an annual meeting and by a three-fourth vote of the members of the church present and voting.

b) No such vote took place at a meeting of the church at which a quorum was determined or declared to be present.

c) There is no provision in the Constitution and By-laws of defendant church for taking a secret vote outside of a regularly constituted meeting of members at which a quorum is present.

d) There is no provision in the Constitution and By-laws which permits the accumulation of votes of members on any subject taken from time to time and outside of a meeting of members duly called in accordance with said Constitution and By-laws.

e) There is no provision in the Constitution and By-laws for absentee ballot, or voting by mail or proxy.

f) There is no provision in the Constitution and By-laws for ratification of a vote of members taken other than in accordance with the provisions thereof.

9. Plaintiffs say that the members of defendant church were advised by letter dated April 19, 1961 that the voting to approve the Constitution of the United Church of Christ and "to become a part of it" would take place on April 30, 1961. The only business to come before the members at the meeting held following sabbath service on that date was the election of a trustee. Prior to and following sabbath service on said date members who wished to vote were required to go to a room adjacent to the foyer of the defendant church, sign their names to a list of the members voting, mark a ballot and deposit the same in a box through a slot.

10. Plaintiffs further say that the same procedure was followed the following Sunday, May 7, 1961 except the only matter of business presented to the meeting following sabbath service was whether the voting procedure was "fair and acceptable". No vote was taken at said meeting on the approval of the Constitution of the United Church of Christ or that the defendant church should become a part of it.

11. Plaintiffs are informed, believe, and therefore allege on information and belief that ballots were furnished to members requesting them to, enable such members to vote by mail, and that such votes have been counted and included in the total vote of all persons claimed to have voted on or before May 7, 1961.

12. Plaintiffs further say that said pretended vote to make the defendant church a part of the United Church of Christ and subject to the overall constitution of said church is a vote involving matters of fundamental and traditional doctrine, faith, dogma, and procedures and a departure from those theretofore held and followed by defendant

church, and would deprive these plaintiffs, as a faithful minority, of their rights in the properties and assets of the defendant church under the Constitution of the United States and the laws and Constitution of the State of Ohio.

13. Plaintiffs say that timely objection was made to the said voting procedures before any announcement was made of the results thereof.

14. Plaintiffs further say that there is a genuine controversy between the parties hereto and that the plaintiffs are without an adequate remedy at law; that said pretended vote should be held and declared to be without legal force or effect and void; and that the defendant church, its officers, trustees, agents, and pastor should be restrained and enjoined from expending any funds of defendant church to carry out the scheme and purpose to make the defendant church a part of the United Church of Christ and subject to the constitution of that church, its Associations, Conferences, and General Synod.

WHEREFORE, plaintiffs pray as follows:

1. For a judgment finding and declaring said pretended vote on said proposed merger to be without legal force and effect and wholly void;

2. For a judgment finding and declaring that a vote of defendant church to approve the constitution of the United Church of Christ and to become a part of it involves matters of fundamental and traditional doctrine, faith, dogma, polity and procedures;

3. For a temporary order restraining and enjoining the defendant church, its officers, trustees, minister, and agents from expending any moneys of defendant church to carry out or put into effect or maintain said proposed merger from its general funds or to transfer or convey any assets of defendant church to said United Church of Christ or to any Board or instrumentality thereof, and that on the final hearing hereof that said order be made permanent.

4. For such other and further relief to which plaintiffs may be entitled, and for their costs herein.

ANSWER

Filed: 8/21/61

Defendant Washington Congregational Church for its answer herein:

SECOND DEFENSE

16. Incorporating all the allegations of its first defense, defendant further alleges:

(a) That an action was heretofore instituted in the Supreme Court of the State of New York, County of Kings, by the Cadman Memorial Congregational Society of Brooklyn and the Cadman Memorial Church, suing on behalf of themselves and other Congregational Christian Churches similarly situated, against Helen Kenyon, as Moderator of the General Council of the Congregational Christian Churches of the United States, as defendant. Final jr lg-

ment in the said action was rendered on the merits in favor of said defendant and against said plaintiffs. The decisions in said action are reported at 195 Misc. 124, 95 N. Y. S. 2d 133, rev'd, 279 App. Div. 1015, 1074, 111 N. Y. S. 2d 808 (2d Dept., 1952), aff'd, 306 N. Y. 151, 116 N. E. 2d 481 (1953). Defendant refers to the opinion of the Court of Appeals in said action dated December 3, 1953, and incorporates the same herein by reference.

(b) In the aforesaid action (hereinafter referred to as the "Cadman case"), plaintiffs representing the class represented by the plaintiffs in the present action, claimed and sought declarations of rights and interests in the subject matter of the litigation which are, in all substantial respects, identical with the rights and interests asserted by the plaintiffs herein and for which declarations and injunctions are sought in the present action.

(c) The judgment entered in the Cadman action in favor of the defendant therein and against the plaintiffs therein *was a final adjudication rendered on the merits on the "identical" cause of action stated in the Complaint* herein and, as such, is binding on the plaintiffs herein and the class which they represent, and is fully determinative of all the issues which were or could have been presented in that action and which are now sought to be presented to this Court.

(d) By reason of the aforesaid judgment rendered in favor of the defendant and against the plaintiffs and the class they represented in the Cadman action, the subject matter of the Complaint herein has been previously adjudicated and determined.

17. Alleges that in an action pending in the United States District Court of the Southern District of New York, Civil Action No. 121-353, in which the plaintiffs in this action are represented by the First Congregational Church and Society of Burlington, Iowa, Mayfair Congregational Church of Toledo, Ohio, its minister Angus MacDonald and others, as plaintiffs, (hereafter referred to as the "Mayfair case") and in which the defendant is represented by Fred Hoskins and James E. Wagner, as Co-Presidents of the United Church of Christ, and others, as defendants, on or about the 11th day of June, 1961, judgment was rendered by which it was adjudged and determined that the plaintiffs in the Cadman suit represented the members of all other Congregational Christian Churches including the parties to this action and that other Congregational Christian Churches and their members do not have interests substantially different from the Cadman Church so as to give them the right to a private redetermination of the validity of the union of the Evangelical and Reformed Church and the General Council of the Congregational Christian Churches that in the Mayfair case it was further adjudged and determined *that in the Cadman case,* the Court of Appeals of N. Y. had made an adjudication binding upon all of the members of Congregational Christian Churches that:

> "Under the Basis of Union no Congregational Christian Church, association, conference, or their members, would be subject in respect to either their spiritual or temporal affairs to any control by the proposed United Church of Christ. Freedom of worship and education at present enjoyed would be preserved in the United Church and not abridged. No individual church would be obligated to join the union

except through its own voluntary action. Each member church would continue to possess the same freedom of faith and manner of worship as theretofore enjoyed. There would be no interference in or abridgement of Congregational usage and practice. Under these circumstances no ecclesiastical question was presented."

Plaintiffs are concluded and bound by said judgments and determinations as to all issues litigated, or which could have been litigated, in said action.

THIRD DEFENSE

18. Incorporating all the allegations of its first and second defenses, defendant further alleges:

(a) That the aforesaid decision and judgment in the Cadman case established that the Basis of Union with Interpretations was legally entered into and is valid; that the General Council had authority and power to enter into the compact represented thereby and to carry out the terms thereof; that the Basis of Union, by its express terms, preserves to the respective local churches, conferences, conventions and associations complete autonomy of self-government; that under the Basis of Union there will be no intrusion in or abridgment of traditional congregational polity and usage through fellowship of independent autonomous congregations free of authoritative control; that the proposed union will in no way change the historical and traditional pattern of the individual Congregational Christian Church; that no action taken by the General Council leading to a consummation of the Basis of Union will in

any way obligate the individual church to join in the union, except through its own voluntary action; that each member church will continue to possess the same freedom of faith and manner of worship as heretofore enjoyed; that no changes in the constitutions and by-laws of local churches occurred by reason of the merger or by the approval of the Constitution of the United Church of Christ by a local church; that there will be no interference in or abridgment of congregational usage and practice; that the very nature of Congregationalism insures the integrity of the individual Congregational Christian Church, its faith and independence; that under the Basis of Union with Interpretations no ecclesiastical question is presented; that no trust funds or assets, including pension funds, held by or under the control of the defendant are in any way affected by the Union; that there is no threat or prospect of violations of or changes in the charters and Certificates of Incorporation of the defendant.

(b) Such determinations were again presented and finally adjudicated in the Mayfair case wherein it was specifically determined that the Cadman case made an adjudication *finding* upon all the members of the Congregational Christian Churches and plaintiffs are estopped from raising such issues in this action.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Filed March 13, 1962

Now comes defendant, Washington Congregational Church, the action herein being at issue, and upon the plead-

ings herein and the affidavits filed in support hereof, moves the Court for a summary judgment in its favor on each and all of the issues raised in the above entitled cause said motion being made severally as to each issue, for each and all of the following reasons:

1. The *subject matter* of the petition herein has been previously adjudicated and determined in the cases of "Cadman Memorial Congregational Society of Brooklyn and Cadman Memorial Church suing on behalf of themselves and other Congregational Churches similarly situated against Helen Kenyon, as Moderator of the General Council of the Congregational Christian Churches of the United States as defendant" (195 Misc. 124, 95 N.Y.S. 2d 133, rev'd, 279 App. Div. 1015, 1074, 111 N.Y.S. 2d 808 (2d Dept. 1952), aff'd, 306 N.Y. 151, 116 N.E. 2d 481 (1953)), hereinafter referred to as the "*Cadman case*" and in the case of "First Congregational Church and Society of Burlington, Iowa vs. Evangelical and Reformed Church et al." United States District Court, Southern District of New York, 198 Fed. Supp. 677 (1961), hereinafter referred to as the "*Mayfair* case". *The foregoing were class actions* and the plaintiffs in the present action are members of the class represented by the plaintiffs in the *Cadman* and *Mayfair* cases. Therefore, plaintiffs are *barred* from maintaining this action.

2. Plaintiffs are estopped by the judgments entered in the *Cadman* and *Mayfair* cases to the extent of the following issues which were conclusively determined therein:

That the Basis of Union with Interpretations was legally entered into and is valid; that the General Coun-

cil had authority and power to enter into the compact represented thereby and to carry out the terms thereof; that the Basis of Union, by its express terms, preserves to the respective local churches, conferences, conventions and associations complete autonomy; that under the Basis of Union there will be no intrusion in or abridgment of traditional congregational polity and usage through fellowship of independent autonomous congregations free of authoritative control; that the proposed union will in no way change the historical and traditional pattern of the individual Congregational Christian Church; that no action taken by the General Council leading to a consummation of the Basis of Union will in any way obligate the individual church to join in the union, except through its own voluntary action; that each member church will continue to possess the same freedom of faith and manner of worship as heretofore enjoyed; that no changes in the constitutions and by-laws of local churches occurred by reason of the merger or by the approval of the Constitution of the United Church of Christ by a local church; that there will be no interference in or abridgment of congregational usage and practice; that the very nature of Congregationalism insures the integrity of the individual Congregational Christian Church, its faith and independence; that under the Basis of Union with Interpretations no ecclesiastical question is presented; that no trust funds or assets, including pension funds, held by or under the control of the defendant are in any way affected by the Union; that there is no threat or prospect of violations of or changes in the charters and Certificates of Incorporation of the defendant; that the *Cadman* case made an adjudication binding upon all the members of

the Congregational Christian Churches and plaintiffs are estopped from raising such issues in this action; and that the Constitution of the United Church of Christ does not depart from the Basis Of Union with Interpretations, nor does said constitution bring about any change in the situation existing previous to its adoption insofar as the rights of the plaintiffs herein are concerned.

3. The subsidiary procedural issues relating to the method of voting originally, upon the record before the Court, clearly are without merit; and subsequent votes, including one taken at the direction of the Court, render any objections to the original vote entirely moot.

Defendant is filing herewith affidavits of J. Theodore Bertsch, William Kamke and Lorin T. Wood, and a brief in support of the foregoing motion.

JOURNAL ENTRY

This day this cause came on to be heard on plaintiffs' motion that conclusions of fact be found separately by the Court from conclusions of law; plaintiffs' one suggested conclusion of fact; defendant's objection to plaintiffs' proposed conclusion of fact and suggestions as to same; and plaintiffs' objections to proposed findings of fact and conclusions of law submitted by defendant; and the oral arguments, briefs and statements of counsel in connection therewith; and the Court being fully advised in the premises, finds that the motion that conclusions of fact be found separately by the Court from conclusions of law should be

and the same hereby is granted to the extent and in the manner hereinafter set forth.

This day this cause further came on to be heard on the petition, answer, supplement to answer, reply, defendant's motion for summary judgment (and the affidavits and exhibits filed in support thereof and in opposition thereto or introduced in evidence at the time of the hearing), the records and briefs in prior litigation (hereinafter referred to), the oral arguments, briefs and statements of counsel, and upon the evidence.

The petition in this action brought by the named plaintiffs as members of defendant Washington Congregational Church alleges that the vote of said church to become a part of the United Church of Christ effected a departure from the traditional doctrine, faith, dogma and procedures formerly held by defendant church as a church of the Congregational Christian faith and order, and as such deprived plaintiffs of their rights in its properties and assets. The petition also objects to the procedure employed in taking such vote. The petition seeks to have the aforesaid vote declared void and to restrain defendant from carrying out the aforesaid vote in any way.

Defendant's answer contains a general denial and affirmative defenses in which it is alleged that issues here sought to be determined have already been adjudicated in two prior class actions in which the plaintiffs here were represented by the class plaintiffs which created an estoppel by judgment and was res judicata as to such issues. It is upon these defenses that defendant moves for summary judgment.

THE COURT BEING FULLY ADVISED IN THE PREMISES, FINDS that the pleadings, affidavits, admissions of the genuineness of papers and documents, and the evidence before the Court, show that there is no genuine issue as to any material fact but only disputed questions of law and that defendant Washington Congregational Church is entitled to judgment as a matter of law.

THE COURT FURTHER AND SEVERALLY FINDS AND SPECIFIES that each of the following facts exists without controversy or is not actually and in good faith controverted, to-wit:

1. An action was heretofore instituted in the Supreme Court of the State of New York, County of Kings, by the Cadman Memorial Congregational Society of Brooklyn and the Cadman Memorial Church, suing on behalf of themselves and other Congregational Christian Church similarly situated, against Helen Kenyon, as Moderator of the General Council of the Congregational Christian Churches of the United States, as defendant. Final judgment in the said action (hereinafter referred to as the "Cadman case") was rendered in favor of said defendant and against said plaintiffs. The decisions in said action are reported at 195 Misc. 124, 95 N. Y. S. 2d 133, rev'd., 279 App. Div. 1015, 1074, 111 N.Y.S. 2d 808 (2d Dept. 1952), aff'd. 306 N.Y. 151, 116 N. E. 2d 481 (1953).

2. An action was heretofore instituted in the United States District Court for the Southern District of New York by the Mayfair Congregational Church of Toledo, Ohio, its minister Angus MacDonald, one of its members, and others, as plaintiffs against Evangelical and Reformed

Church, and others as defendants. Final judgment in that action (hereinafter referred to as the "Mayfair case") was rendered in favor of defendants and against plaintiffs, the decision being reported at 198 Fed. Supp. 677, under the title First Congregational Church and Society of Burlington, Iowa, et al, plaintiffs v. Evangelical and Reformed Church, et al, defendants. (Aff'd. Aug. 1, 1962, C. A. 2d Docket No. 27258).

3. On May 8, 1961, defendant Washington Congregational Church issued a letter to all its members announcing that a majority of such members had voted to approve the Constitution of the United Church of Christ and in favor of Washington Congregational Church becoming a part of it. Said vote was 154 for and 55 against approving such Constitution. The events leading up to the issuance of said letter dated May 8, 1961 by defendant are set forth in Paragraphs 7 to 11 inclusive of defendant's Answer and Appendix A and Appendix B thereto.

4. Upon the filing of the petition in this case a temporary injunction was issued without notice to defendant or any hearing thereon, and service of the same, together with summons in this case, was served upon plaintiff Earl Dew as statutory agent for defendant.

THE COURT CONCLUDES AS MATTERS OF LAW THAT:

I. Plaintiffs in the Cadman case represented a class of which plaintiffs in the present action were members and claimed and sought declarations of rights

and interests in the subject matter of the litigation which included all the rights and interests asserted by plaintiffs herein, (except plaintiffs' objections to the voting procedure employed). Plaintiffs herein are estopped by said judgment from litigating the issues presented herein (except plaintiffs' objections to the voting procedure employed) and said case is res judicata as to such issues.

II. Plaintiffs in the Mayfair case represented a class of which plaintiffs in the present action were members and claimed and sought declarations of rights and interests in the subject matter of the litigation which included all the rights and interests asserted by plaintiffs herein, (except plaintiffs' objections to the voting procedure employed). Plaintiffs herein are estopped by said judgment from litigating the issues presented herein (except plaintiffs' objections to the voting procedure employed) and said case is res judicata as to such issues.

III. Washington Congregational Church has taken lawful and proper procedure to approve the Constitution of the United Church of Christ and become a part of it and is now a local church of the United Church of Christ.

IV. The vote to approve the Constitution of the United Church of Christ and in favor of defendant, Washington Congregational Church, being a part of it, was in all respects legal and proper and did not involve any change whatsoever in the Constitution of defendant church.

V. The procedure employed by defendant on and prior to May 7, 1961, to secure a vote on approving the Constitution of the United Church of Christ and in favor of defendant church becoming a part of it, was in all respects legal and proper.

VI. The temporary injunction issued upon the filing of this case, without notice to defendant or hearing thereon, ought not to have been granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the temporary injunction heretofore issued in this cause without notice or hearing be and the same is hereby dissolved and terminated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' petition herein be and the same is hereby dismissed with prejudice at plaintiffs' costs and that judgment be and the same hereby is entered for defendant against plaintiffs for such costs.

To each adverse portion of this journal entry the respective parties object and except.

PROOF OF SERVICE

This is to certify that copies of the foregoing have been mailed by registered mail, return receipt requested, this 30th day of January, 1963, to the following counsel of record, to-wit:

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